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Recent Developments: Shapero v. Kentucky Bar Ass'n: Supreme Court Holds That a State May Not Categorically Prohibit Targeted, Truthful and Nondeceptive Lawyer Advertising

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DeBartolo Corp. v. Fla. Gulf Coast Trades Council: SUPREME COURT CLARIFIES THE PROVISO TO §8(6)(4) WHICH ALLOWS UNIONS TO CONDUCT INFORMATIONAL ACTIVITY.

In *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, ___ U.S. ___, 108 S. Ct. 1392 (1988), the United States Supreme Court, on a petition for certiorari, ruled that peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer was not coercive and therefore not a violation of § 8(b)(4) of the National Labor Relations Act.

The Florida Gulf Coast Building and Construction Trades Council (union) peacefully handbilled the customers of a shopping mall asking them not to shop at any of the mall's stores. The union's dispute was with a construction company, for one of the mall's tenants, whom they alleged paid substandard wages and fringe benefits to workers. The union hoped to influence the merchants, through a consumer boycott, to put pressure on the construction company.

The owner of the mall, the Edward J. DeBartolo Corporation (DeBartolo), filed a petition with the National Labor Relations Board (NLRB) charging an unfair labor practice pursuant to § 8(b)(4) of the National Labor Relatons Act (NLRA). The NLRB ruled that the union did not violate the act because handbilling was under the proviso for consumer publicity used to inform a distributor's customers that the manufacturer or producer of merchandise was involved in a labor dispute. The ruling was affirmed by the Court of Appeals for the Fourth Circuit. However, the Supreme Court of the United States reversed and remanded the case because the proviso to § 8(b)(4) did not cover the situation where the mall merchants do not distribute the construction company's products. The Court asked for a determination of whether the handbilling fell within the prohibition of § 8(b)(4), and, if so, whether it was protected by the first amendment. *Id.* at ___, 108 S. Ct. 1392.

The NLRB reversed itself on remand and decided that there was a violation of § 8(b)(4) because "handbilling and other activity urging a consumer boycott constituted coercion." *Id.* However, the Court of Appeals for the Eleventh Circuit had serious doubts about whether § 8(b)(4) could constitutionally ban peaceful handbilling not involving nonspeech elements and reversed the NLRB using the Supreme Court's reasoning in *NLRB v. Catholic Bishop of Chicago, Id.* Due to important labor and constitutional law issues, the Court granted certiorari and affirmed.

Although the NLRB's interpretations of the NLRA are normally entitled to deference, under the "Catholic Bishop's Rule", where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Id.* at ___, 108 S. Ct. 1397. The NLRB's construction of the statute, as applied in this case, posed serious questions of the validity of § 8(b)(4) under the First Amendment. *Id.*

The handbilling was peaceful, truthfully told customers about an existing labor dispute, and did not involve picketing. Similar acts by the union, such as generally discussing low wages via literature distributed in town or radio advertisements, would not violate the statute and would be protected by the First Amendment. Similarly, handbills discussing a specific wage dispute should be equally protected. To hold otherwise "would require deciding serious constitutional issues." *Id.* at ___, 108 S. Ct. at 1397-98.

Next the Court reviewed whether Congress intended to ban handbilling under § 8(b)(4). The legislative history, however, clearly showed that a "union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of ambulatory picketing in front of a secondary site." *Id.* at ___, 108 S. Ct. at 1404.

The decision in DeBartolo establishes that the proviso to § 8(b)(4) of the National Labor Relations Act is a clarification which allows unions to conduct informational activity short of picketing. *Id.* The proviso need not be treated as establishing an exception to an otherwise all encompassing NLRA prohibition on publicity. Rather it provides protection from communication, such as picketing, which would be considered coercive.

—Andrea White Steele

Shapero v. Kentucky Bar Ass'n: SUPREME COURT HOLDS THAT A STATE MAY NOT CATEGORICALLY PROHIBIT TARGETED, TRUTHFUL AND NONDECEPTIVE LAWYER ADVERTISING.

In Shapero v. Kentucky Bar Association, __U.S.__, 108 S. Ct. 1916 (1988), the United States Supreme Court held that a state may not, consistent with the first and fourteenth amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face a particular legal problem.

In 1985 Shapero, a member of the Kentucky Bar, sought the Kentucky Attorneys Advertising Commission's approval of a letter that he proposed to send to potential clients who had pending foreclosure actions. In part the proposed letter stated that "you may be about to lose your home," that "[f]ederal law may allow you to keep your home by ORDERING your creditor [sic] to STOP," that "[y]ou may call my office for FREE information," and that "[i]t may surprise you what I may be able to do for you." The Commission did not find the letter to be false or misleading but found it contrary to the existing Kentucky Supreme Court rule which prohibits direct mailing to specific individuals as distinguished from mailing to the general public. 108 S. Ct. at 1919. The Commission, citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), offered its view that the Kentucky rule violated the first amendment and recommended that it be changed. 108 S. Ct. at 1920.

Shapero then sought an advisory opinion as to the rule's validity from the Kentucky Bar Association's Ethics Committee. The Committee indicated that the rule was consistent with the American Bar Association (ABA) Model Rule 7.3. After reviewing the Committee's opinion, the Kentucky Supreme Court,

citing *Zauderer,* replaced its rule with the ABA Model Rule 7.3. Model Rule 7.3 also prohibits targeted, direct mail solicitation by lawyers for pecuniary gain without a particularized finding that the solicitation is false or misleading. The court did not address the specific problem with its rule nor how Rule 7.3 corrected it. *Id.*

The Supreme Court considered the issue of whether the blanket prohibition of Rule 7.3 was consistent with the first amendment. The Court stated that a lawyer's right to advertise was constitutionally protected commercial speech, and if not false or deceptive and did not concern unlawful activity, it could only be restricted by a compelling governmental interest. "[S]tate rules that are designed to prevent the potential for deception and confusion...may be no broader than reasonably necessary to prevent the perceived evil." *Id.* at 1921 *(quoting In re R.M.J.,* 455 U.S. 191, 203 (1982)).

In *Zauderer,* the Supreme Court struck down on Ohio rule that "categorically prohibited solicitation of legal employment for pecuniary gain through advertisements containing information or advice, even if truthful and nondeceptive, regarding a specific legal problem." 108 S. Ct. at 1921. It distinguished written advertisements from in-person solicitation by lawyers, which it had previously held in *Ohralik v. Ohio State Bar Ass'n.,* 436 U.S. 447 (1978) may be banned by a state. The Court reasoned that Ohio could not prevent Zauderer from mass-mailing to the general population his offer to represent women who were injured by the Dalkon Shield any more than it could prevent the publication of the advertisement in the newspaper. Similarly, the Court reasoned that if Shapero's letter was not false or deceptive, Kentucky could not constitutionally prohibit him sending identical letters to targeted individuals. 108 S. Ct. at 1921.

The Supreme Court observed that the Kentucky Court disapproved Shapero's letter because it was directed to a specific group of people who were known to need legal services rather than a broader group who may have found the services useful. However, the Court determined that the "First Amendment does not permit a ban on certain speech merely because it is more efficient...." *Id.*

The Kentucky Supreme Court concluded that its ban on targeted, direct mail solicitation was proper because of the potential abuse by lawyers. By analogy to *Ohralik* (a state could categorically ban all in-person solicitation), the court observed that direct mail solicitation incurred the same pitfalls as in-person solicitation by a lawyer. The Supreme Court, however, dismissed that notion by stating that any potential client would feel equally "overwhelmed by his legal troubles and will have the same impaired capacity for good judgment regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement...or instead mails a targeted letter." *Id.* at 1922. Additionally, the Court found the Kentucky court's reliance on *Ohralik* misplaced since that decision was based on two factors. First, there was a strong possibility of improper lawyer conduct in face-to-face solicitation. Secondly, there were the inherent difficulties of regulating in-person solicitation since it was not open to public scrutiny and therefore it had greater potential for abuse. The Court stated that the mode of communication makes the difference since there is much less a risk in the targeted, direct-mail solicitation context.

Written communication did not involve "the coercive force of the personal presence of a trained advocate," *Id.* at 1922 *(quoting Zauderer,* 471 U.S. at 642).

The Court differentiated written solicitation from in-person solicitation and discussed methods which could be used to regulate targeted, direct mail solicitations. For example, unlike in-person solicitation, an advertisement can be set aside, ignored, or discarded. 108 S. Ct. at 1923. They suggested that a state could regulate for potential abuses by requiring a lawyer to file any solicitation letter with a state agency allowing the state to supervise and apply sanctions to actual abuses. Likewise, the state could require the lawyer to prove the validity of the statements made in the letter, how the information was discovered and verified, or it could require solicitation letters to be labeled as an advertisement. The Court emphasized that the free flow of commercial speech was valuable enough to impose the burden and cost on regulators in their efforts to scrutinize it. *Id.* at 1924.

Finally, the Court addressed the Kentucky court's contention that Shapero's letter was so particularly overreaching that it was unworthy of first amendment protection. The Kentucky court highlighted two features which it addressed as being high pressure and overbearing solicitation. The first feature was the letter's use of uppercase letters (e.g., "Call NOW, don't wait"; it is FREE"). Secondly, the court objected to the language in the letter (e.g., "It may surprise you what I may be able to do for you") which it termed as "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing." *Id.*

The Supreme Court conceded that such style may attract the reader's attention more readily than a bland statement, but a truthful, nondeceptive letter could never be equated with face-to-face solicitation which could lead to overreaching. "And as long as the first amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitation to those least likely to be read by the recipient." *Id.*

In conclusion, the Supreme Court seems to suggest that almost anything can be done to solicit clients as long as it is not false, misleading, misrepresented, or in person. This decision may have dealt a crippling blow to Rule 7.3 of the Maryland Rules of Professional Conduct which is mirrored after the ABA Model Rule 7.3, the subject of the Court's ruling.

—George I. Cintron